IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 122 OF 2000

Damaji Sambha Khandekar ..... Appellant.

versus

The State of Maharashtra ..... Respondents.

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Shri S.B.Shetye advocate appointed for the
appellant/accused.
Mrs. U.V.Kejariwal APP for State.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 8TH OCTOBER, 2004.

ORAL JUDGMENT (Per Palshikar, J.);

1. Being aggrieved by the the order of conviction passed by the V Additional Sessions Judge, Sangli in Sessions Case No. 129 of 1998 under sections 302, 307, 364, 404 of IPC on 31-1-2000 the appellant has preferred this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us.

2. With the assistance of the learned counsel for the accused and the learned Prosecutor, we have scrutinised the records of the case and re-appreciated the evidence on record.

3. The prosecution story stated briefly is that the accused and complainant are real brothers and the accused is charged for having committed murder of his brother's wife Yeshoda. The complainant's name is Shivaji. According to the prosecution on 18-2-1998 the accused came to the house of the complainant and took the wife of the complainant with him. Then next day morning he returned and took the dagughters of the complainant with him. The daughters on the next day were found in the house of cousin of the complainant. They (the daughters) narrated to the complainant, how they and their mother were asked to come out of the house by the accused Damaji. Thereafter according to the prosecution, the dead body of the wife of the complainant was found on 24-2-1998. Earlier to that the complainant had filed a complaint in the police stating that his wife is missing. Thereafter some investigation took place and on 19th April 1998 the accused, present appellant, was arrested. The prosecution has examined 14 witnesses to prove its case that the murder of Yeshoda was committed by Damaji, the present appellant. The learned trial Judge on appreciation of this evidence came to the conclusion of guilt and convicted the accused as aforesaid. It is this order of conviction and sentence, which is impugned in this appeal on the ground mentioned in the

memo of appeal as also orally canvassed before us by the learned counsel appearing on behalf of the appellant.

4. The learned counsel submitted that there is no eye witness account in so far as the murder is concerned. In so far as the kidnapping of the victim and the daughters is concerned, there is no evidence on which reliance can be placed. Several important omissions and improvements have been relied upon by the learned counsel for contending that the order of conviction is unsustainable in law. Regarding the question of recovery of ornaments (Mangalsutra) at the instance of the accused, he contended that even if this recovery is accepted as correct, all that has been proved is that the ornaments was pledged by the accused with the P.w.7 Rajendra. According to the learned counsel, the maximum inference that can be drawn from this recovery with the aid of section 114 of the Evidence Act is that the recovery may prove that the accused was either a thief or a receiver of the stolen property. In the absence of any further connecting evidence this recovery cannot lead to an inference that the accused killed Yeshoda who was missing since 18-2-1998. The learned counsel urged that there are glairing error in the FIR and the deposition of P.w.3 the complainant. The elder daughter of the complainant, who was adult,

is not examined. Only minor daughters are examined. The reason for non examination is not forthcoming. The important independent witnesses who were available have not been examined. There is therefore no corroboration to the testimony of the complainant P.w.3. Even in the deposition of P.w.3 there are serious improvement and omissions. Taking into consideration all that, according to him, even if the entire evidence is accepted, what has been proved is that the fact that (1) the wife of the complainant was missing from 18-2-1998 and that (2) her dead body was recovered on 24-2-1998, and (3) accused had pledged the ornaments belonging to Yeshoda with P.w.7 Rajendra, which can give raise to the presumption that the accused is either a thief or receiver of the stolen property in relation to this ornaments. The learned counsel then contended that the prosecution has failed to prove that Yeshoda was wearing this ornaments at the time when she was found missing. In fact in cross examination the complainant has been asked that Yeshoda had left the house in anger after putting down all the ornaments and money which she has and the quarrel being on the issue of returning the entire amount of loan, and the complainant has denied this suggestion. However, nobody has seen the victim Yeshoda going away from the house on 18-2-1998, wearing the mangalsutra. Even the two daughters who have been examined do not speak of

such ornaments being worn by the mother when she left on 18-2-1998. He therefore prayed that the order of conviction at any point of view is unsustainable.

5. These submissions were countered by the learned A.P.P. appearing on behalf of the State. According to her, the evidence of last seen together and the recovery of the ornaments from P.w.7 at the instance of the accused are enough circumstances to come to the conclusion that the accused has committed murder of the victim. She therefore prayed for maintaining the order of conviction.

6. We have to appreciate the evidence of 14 witnesses in the light of the above submissions. P.w.1 Ramchandra Vanmane is an independent witness who proved the panchanama of recovery of broken pieces of bangles from a well and he states that he heard Laxmi saying that she was thrown in the well by her uncle. P.w.2 Gajanan is another panch to prove the panchanama of the dead body recovered on 24-2-1998. P.w.3 Shivaji is the complainant, husband of the victim, who has deposed in extenso regarding the accused coming on 18-2-1998 and taking away his wife and then came on 19-2-1998 and taking away the daughters and his search for them, complaining to the police about his missing wife and then identifying the body of his wife on 24-2-1998. We

will discuss the evidence of this witness complainant, in extenso separately.

7. P.w.4 is Parubai who saw the accused talking to the deceased and then saw that the wife and daughters of the complainant have gone with the accused. P.w.5 is the person in whose field the body of victim Yeshoda was discovered. P.w.6 is Laxmi the daughter of the victim who alleges that she was thrown in the well by the accused and she came out of the well and saw the accused taking her sister and therefore shouted and both of them ran towards Sangita and told her that they were being thrown in the well (Dabare) and then told their father P.w.3 about this. This entire episode about the witness being thrown in the well and rescued, is alleged to have been told by her to P.w.3 the father. But the father in his entire deposition does not mention about a word of such assault on his daughter by the accused. In fact to the same effect is the evidence of P.w.8 Manisha, the other daughter who also speaks about being thrown in the well and then rescued and going to village Kole. P.w.7is Rajendra with whom the ornaments were pledged by the accused, which was produced at the instance of accused. P.w.9 is a formal witness. Then P.w. 10 is the doctor who examined Laxmi and proved that she had certain minor injuries. P.w.11 is also the doctor who proved that

the death of Yeshoda was homicidal. P.w.12 is the person who informed P.w.3 about the presence of his daughters at village Kole. P.w. 13 is the panch to the panchanama of the seizure of ornaments at the instance of the accused from P.w.7 Rajendra. He has proved the same. P.w.14 is the investigating officer.

8. That takes us to the consideration of the evidence of P.w.3 Shivaji on which the entire prosecution story is based. He narrates in detail how he went out, how he could not come back because of his eye sight being weak in the night, how he stayed with Hari Aiwale, how he was told of his daughter and wife being taken away by the accused, how he searched for them and ultimately how he found them and brought them to home. During the entire narration he however does not speak a word about either Laxmi or Manisha telling him that they were assaulted by the accused in the manner in which they have deposed in the court. These allegations are also absent in the FIR which the complainant lodged immediately on recovery of the body of the deceased. There is no mention by the complainant or anybody else about the assault on Laxmi and Manisha by the accused in the manner in which they so alleged. There is therefore decided improvement in the entire prosecution case in the shape of testimony of Manisha and Laxmi. Their evidence and their cross examination disclosses

that they have told of this incident to their father. It is impossible to believe that a father after having told of such assault on his daughters, would forget to mention it either in the FIR or in the court as is contended. It is therefore obvious that the prosecution has decidedly improved its case by alleging that the accused was responsible not only for kidnapping or assault on the minor daughters but was also kidnapping and murdering Yeshoda the victim, wife of P.w.3 Shivaji. The evidence of this complainant P.w.3 creates several doubts. For instance he nowhere says that the wife was wearing the mangalsutre when she left the house on 18th. He has deposed that he stayed in the night of 18th at the house of Hari Aiwale. But that Hari Aiwale is not examined to corroborate the testimony of this witness when he urges that in the night of 18th he stayed with Hari Aiwale and next day returned to his house. On 19th he found that his daughters were missing and then again could not state anything, but on 20th itself lodging the complaint of missing of minor two daughters with the story of Laxmi and Manisha were kidnapped and assaulted without explaining the delay of two days that has occured in lodging the complaint of missing. There is nothing on record to prove that the complainant stayed with Aiwale, there is nothing on record to prove that what the witness was doing from 18th to 20th. The

unexplained delay of lodging the complaint by the complainant coupled with report of missing of wife and recovery of the dead body of his wife from the field does not complete the chain of circumstances. There is no evidence to show how the wife went away, there is no cogent evidence of the victim and accused being last seen together. The allegation is that they were last seen together on 18th and the body was discovered on 24th Feb. 1998 i.e. after the period of six days. The body was recovered in decompose condition. The time of death is not ascertained. In such circumstances merely because the wife was taken away by the accused should be treated as last seen with the accused and therefore the accused is convicted. From the recorvery of ornaments, the maximum presumption from such recovery can be the accused being a thief or receiver of the stolen property, no further inference is possible. In such circumstances, in our opinion, it is extremely unsafe to convict the accused on the basis of such scandy evidence. In our opinion the prosecution has miserably failed to prove the circumstances leading from the disappearence of the wife and to the locating of her dead body on 24-2-1998. There is no connection between the disappearence and death of the victim and the accused. Therefore we are unable to accept the order as correct. In the result the appeal succeeds and is allowed. The impugned order

is set aside. The accused be set at liberty forthwith if not otherwise required.

9. The fees quantified to the learned advocate appointed and the learned A.P.P. is Rs. 1000/- for this apopeal.

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